Weng Wah Construction Co Sdn Bhd v Yik Foong Development Sdn Bhd

HIGH COURT (KUALA LUMPUR) — COMPANIES (WINDING-UP) PETITION NO D5–28–300–90
ABDUL MALEK J
7 APRIL 1994

Companies and Corporations *— Winding up — Notice of demand — Service — Whether service under s 218(2)(a) could be effected by registered post — Companies Act 1965 s 218(2)(a)*

Companies and Corporations *— Winding up — Grounds — Petitioner relying on s 218(2)(a) — Whether petitioner precluded from proceeding under other paragraphs of s 218(2) — Companies Act 1965 s 218(2)*

Companies and Corporations *— Winding up — Presumption of insolvency — Company insolvent but beginning to show profits — Company proposed payment by monthly instalments — Whether company had assets to meet current liabilities — Whether company should be wound up — Companies Act 1965 s 218(2)*

The petitioner petitioned to wind up the respondent for failing to satisfy the judgment debt of RM2,284,627.94 together with interest thereon owed by the respondent to the petitioner. In their affidavit, the petitioner stated that it was abundantly clear that the liabilities of the respondent had exceeded their assets. The respondent proposed to pay the sum of RM30,000 a month but this was not accepted by the petitioner on the ground that it could not even cover the interest accrued and, furthermore, the respondent's total profits for 1993 only amounted to three monthly payments.

Counsel for the respondent raised two preliminary objections that: (i) as the petitioner was solely and wholly relying on s 218(2)(a) of the Companies Act 1965 ('the Act'), service of the notice of demand could only be effected by leaving it at the respondent's registered office and not by sending it by registered post, and because of the non-compliance with the statutory mode of service, there was no statutory presumption of insolvency; and (ii) the petitioner had wandered beyond s 218(2)(a) of the Act by digressing into s 218(2)(c) as well.

Held, allowing the petition:

(1) Following the New Zealand case of *South Seas Development Ltd v Commercial Advances Nominees Ltd*,[2] proof of actual physical delivery by a postal officer of a registered letter containing a notice of demand at the registered office of the company could be effective service within the terms of s 218(2)(a) of the Act as what is important is the adequate proof of physical delivery by the creditor. The obvious underlying requirement is that there must

be adequate proof of physical delivery to the respondent which has been fulfilled in the present case as the notice of demand by registered post was in fact actually delivered to the respondent's registered office. The first preliminary objection as to service was therefore overruled.

(2) The disjunctive use of the word 'or' for the three paragraphs in s 218(2) of the Act clearly means that the petitioner is at liberty to proceed under any or all of them, especially so when they had not specifically stated any particular paragraph in the recital of the petition. The second preliminary objection was therefore lacking in merit as the winding-up order could be given on the basis of para (a) alone.

(3) The respondent's profits for 1993 were a modest RM97,557 which would cover only three monthly payments at the rate of RM30,000 a month as proposed by them. As any possibility of a better margin in their future profits was highly speculative, the court was of the view that the respondent had no assets to meet its current liabilities and were therefore commercially insolvent. It was more than obvious that they are unable to pay their debts, especially considering that the judgment against them was granted almost eight years ago. Although winding up is to be regarded as a remedy of last resort and one which ought not to be granted if some other less drastic form of relief is available and appropriate, there were none here. Accordingly, the petition was granted.

[Bahasa Malaysia summary

Pempetisyen telah membawa suatu petisyen untuk menggulung responden kerana gagal membayar hutang penghakiman sebanyak RM2,284,627.94 bersama dengan faedah ke atasnya yang dihutang oleh responden kepada pempetisyen. Di dalam afidavitnya, pempetisyen menyatakan bahawa memanglah jelas bahawa liabiliti responden telah melebihi asetnya. Responden telah membuat cadangan untuk membayar sejumlah RM30,000 sebulan tetapi ini tidak diterima oleh pempetisyen atas alasan bahawa jumlah itu tidak dapat membayar faedah terakru dan lagipun, jumlah keuntungan responden bagi tahun 1993 hanya berjumlah sebanyak tiga bayaran bulanan.

Peguambela pihak responden telah menimbulkan dua bantahan permulaan bahawa: (i) oleh kerana pempetisyen bergantung sepenuhnya ke atas s 218(2)(a) Akta Syarikat 1965 ('Akta itu'), penyampaian notis tuntutan hanya boleh dilakukan dengan meletakkannya di pejabat berdaftar responden dan bukan dengan menghantarkannya melalui pos berdaftar, dan disebabkan ketidakpatuhan dengan cara penyampaian statutori itu, tidak terdapat anggapan statutori mengenai ketidaksolvenan; dan (ii) pempetisyen telah melampaui s 218(2)(a) Akta itu dengan memasuki s 218(2)(c) juga.

Diputuskan, membenarkan petisyen itu:

(1) Mengikut kes New Zealand *South Seas Development Ltd v Commercial Advances Nominees Ltd*,[2] bukti mengenai penghantar-serahan fizikal sebenar sepucuk surat berdaftar yang mengandungi suatu notis tuntutan oleh seorang pegawai pos kepada pejabat berdaftar sesuatu syarikat boleh menjadi penyampaian yang berkesan mengikut terma s 218(2)(a) Akta itu kerana apa yang penting adalah bukti yang mencukupi mengenai penghantar-serahan fizikal oleh pemiutang. Keperluan dasar yang jelas adalah bahawa mesti terdapat bukti yang mencukupi mengenai penghantar-serahan fizikal kepada responden yang telah dipenuhi di dalam kes ini kerana notis tuntutan melalui pos berdaftar itu telah pada hakikatnya dihantar-serah ke pejabat berdaftar responden. Oleh itu, bantahan permulaan pertama mengenai penyampaian ditolak.

(2) Pengunaan secara penyarak perkataan 'atau' untuk tiga perenggan di dalam s 218(2) Akta itu jelas bermakna bahawa pempetisyen bebas meneruskan petisyennya di bawah mana-mana satu atau kesemua perenggan itu, terutamanya apabila ia tidak menyatakan dengan spesifik sebarang perenggan tertentu di dalam sebutan permulaan petisyen itu. Oleh itu, bantahan permulaan kedua tidak mempunyai merit kerana petisyen penggulungan itu boleh diberikan berdasarkan perenggan (a) sahaja.

(3) Keuntungan responden bagi tahun 1993 hanya sebanyak RM97,557 yang hanya boleh meliputi tiga bayaran bulanan pada kadar RM30,000 sebulan seperti yang dicadangkan oleh mereka. Oleh kerana kemungkinan mendapat suatu margin keuntungan yang lebih baik pada masa depan adalah sangat spekulatif, mahkamah berpendapat bahawa responden tidak mempunyai aset untuk membiayai liabilitinya pada masa kini dan dengan demikian adalah tidak solven dari segi perdagangan. Adalah lebih daripada jelas bahawa mereka tidak dapat membayar hutang mereka, lebih-lebih lagi memandangkan bahawa penghakiman terhadap mereka telah diberikan hampir lapan tahun dahulu. Walaupun penggulungan seharusnya dipandang sebagai suatu remedi terakhir dan tidak seharusnya diberikan jika terdapat suatu relif yang kurang drastik yang lebih sesuai, tidak terdapat sebarang relif sedemikian di sini. Dengan ini, petisyen itu dibenarkan.]

[*Editorial Note*: The respondent has appealed to the Supreme Court vide Civil Appeal No 02–42–94.]

Notes

For cases on winding up, see [1989] Mallal's Digest 150–156, 158, 160; [1990] Mallal's Digest 127–128; [1991] Mallal's Digest 602, 627; [1992] Mallal's Digest 478–480, 484, 490.

Cases referred to

1 *Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 95 (folld)
2 *South Seas Development Ltd v Commercial Advances Nominees Ltd* [1976] 1 NZLR 679 (folld)

YT Ling (*Lee, Ling & Partners*) for the petitioner.
Tan Chin Toh (*KK Chong, Chai & Koo*) for the respondent.
Nor Risan for the Official Assignee.

Abdul Malek J: The petitioner had taken out the petition against the respondent on 15 August 1992 based on the judgment obtained on 22 May 1986 for RM2,284,627.94 together with interest thereon at the rate of 15%pa calculated from 1 November 1985 to the date of full realization and costs of RM458. The judgment also specifically states that there will be no stay of execution.

No payment had been made and on 17 September 1990, the petitioner had sent a notice of demand to the respondent under s 218 of the Companies Act 1965 (hereinafter 'the Act'). Despite that notice, the respondent had yet to make payment.

In their affidavit, the petitioner had stated that the respondent also owed the Director General of Inland Revenue RM1,755,710.02 and Perunding Aziz Sehu Sdn Bhd (hereinafter 'PAS') RM69,000 and with their paid-up capital of RM1.8m, it was abundantly clear that the liabilities of the respondent had exceeded their assets. For the judgment on which the petition is based alone, the petitioner had also affirmed that the sum had now become RM4,997,623.61 as at 1 October 1993 due to the accumulated interest. Apart from that, the respondent had charged all their movable properties to two of the opposing creditors, namely, UMBC Finance Bhd and Visia Finance Bhd (hereinafter 'the chargees'). It should be pointed out that two other opposing creditors, namely, Kam Foong Development Sdn Bhd and Incorporated Organisation Sdn Bhd were not present at the hearing. In addition, learned counsel for the petitioner had also asked for costs against the chargees for the earlier adjournment when they had asked for the postponement before that to reply to the affidavits but had withdrawn as opposing creditors just before this hearing.

The petitioner had alleged that the stand of the chargees was in bad faith and was an abuse of the process of court as they had filed an Originating Summons No 24–49–91 in the High Court at Ipoh after this petition was filed to seek a declaration that the realization by way of sale, private or otherwise, transfer or assignment of the charged properties after the presentation of this petition was not avoided under s 223 of the Act, and other consequential orders. They had also filed the notices to appear in this petition. They had then applied to have the originating summons in the Ipoh case adjudicated first whereupon this matter was adjourned *sine die*. This had caused a considerable amount of delay as the petitioner had only received from the chargees' solicitors a copy of the Ipoh order on 27 July

1993. On 20 August 1993, the chargees had sent to the petitioner a notice of discontinuance in their capacities as opposing creditors. The petition was then fixed for 26 October 1993 but on 21 October 1993 the chargees had again filed their notices of intention to oppose the petition which we know now had again been withdrawn.

In the meantime, the respondent had made proposals to pay but the petitioner's view was that the proposed sum of RM30,000 a month was not acceptable as it could not even cover the interest accrued and which was only equivalent to three monthly payments based on the amount of their 1993 profits as stated in their auditor's report. The petitioner had intimated that they would accept any payment proposals only if the monthly payment was RM200,000 payable over three years.

Learned counsel for the respondent had in fact wanted to raise preliminary objections at the outset but I had refused to hear them then in view of the Supreme Court decision in *Morgan Guaranty Trust Company of New York v Lian Seng Properties Sdn Bhd*[1] which had ruled that a petitioner should not be prevented from pursuing their petition and that it should not be struck out *in limine* but should be heard on its merits so that the court would be able to consider all the evidence and determine whether it should exercise its discretion to order a winding up or not.

Opposing the petition, learned counsel for the respondent had submitted that the petitioner was solely and wholly relying on s 218(2)(a) of the Act and not on the subsequent paras (2)(b) and (2)(c), in which case the service is only by leaving it at the respondent's registered office which had to be strictly complied with. This provision, he added, has to be compared with s 350 of the Act which provides for service by sending by registered post as well, which was the mode taken by the petitioner in this case. In the event, because of the non-compliance with the statutory mode of service, he was of the view that there was no statutory presumption of insolvency.

His second preliminary objection was that the petitioner had wandered beyond s 218(2)(a) of the Act by digressing into s 218(2)(c) as well. In addition, he said that the petitioner had added new allegations not raised in their petition in their subsequent affidavits.

As for the petition itself, learned counsel for the respondent had told the court that they had since recovered from the recession and there was an upward trend in their fortunes as seen from the modest profits in 1993 after the losses sustained in earlier years. He added that even the Government was not proceeding with their winding-up petition against the respondent in view of the respondent's appeal to the Special Commissioners for Income Tax. He confirmed that the respondent had offered the petitioner RM30,000 monthly to settle this debt.

In the circumstances, he was of the opinion that since the petitioner is an unsecured creditor, since the respondent had made a concrete offer to pay and since the court's power in this matter is purely discretionary, interest would best be served by allowing the respondent to continue functioning by dismissing the petition.

In dealing with the first preliminary objection as to the mode of service, I had not had much success in locating earlier local authorities on the same

point despite painstakingly perusing other cases on the mode of service. However, I was fortunate to come across a similar situation in the New Zealand Court of Appeal's decision in *South Seas Development Ltd v Commercial Advances Nominees Ltd*[2] which had ruled that before a demand under s 218(a) of the New Zealand Companies Act 1955 (hereinafter 'the NZ Act'), which is similar to our s 218(2)(a), can be relied upon as a foundation of a winding-up petition, it must be established that the demand had been served on terms of the specific and special requirements of the said section, which is by leaving the notice of demand at the registered office of the respondent company. The said court also held that the general provisions of s 460(1) of the NZ Act in respect of service of notices, which is equivalent to our s 350 in that it provides for the alternative mode of sending the notice of demand by registered post, which was the mode adopted by the petitioner in this case, was not applicable to the service of a notice of demand under their s 218(a).

This of course meant that service by registered post in our case did not comply with the specific requirements of s 218(2)(a) of the Act and the preliminary objection should be sustained. However, the New Zealand Court of Appeal went further to hold that proof of actual physical delivery by a postal officer of a registered letter containing such a demand at the registered office of the company could be effective service within the terms of s 218(a) of the NZ Act as what is important is the adequate proof of physical delivery by the creditor. This was not fulfilled on the facts of that case as the letter to the debtor in that case was only sent to their post box at the local post office and not to their registered office but it is satisfied in our situation as the notice of demand by registered post was in fact actually delivered to the respondent's registered office. The obvious underlying requirement is that there must be adequate proof of physical delivery to the respondent which has been fulfilled in our case. On that score, I had to overrule the first preliminary objection as to service.

It may be relevant to observe why there is an alternative mode of service provided under the general provisions of both the NZ Act and the Act, although it is arguable as to whether the general provisions of the law include the particular ones as the difference could have been due to either drafting oversight or misguided executive policy, but the New Zealand case had stated that the purpose of providing an alternative form of service by registered post in the general section may be to ensure that the sending of a registered letter is sufficient service irrespective of whether or not the letter is received by the addressee.

As for the second preliminary objection that the petitioner is making use of all the provisions in s 218(2) of the Act and not para (a) alone, I find that this objection certainly lacks merit as in the first place the disjunctive use of the word 'or' for the three paragraphs in sub-s (2) of the relevant section of the Act clearly means that the petitioner is at liberty to proceed under any or all of them especially so when they had not specifically stated any particular paragraph in the recital of the petition. In any case, for what it is worth, this objection is of no consequence in view of my overruling the earlier preliminary objection and it follows that the winding-up order may

be given on the basis of para (a) alone. The interesting thing to note is that it is in fact the respondent who is making use of para (c), particularly to show that they are solvent by submitting their latest audited accounts and providing evidence that they had realizable assets and that their profit situation was improving.

As for the petition itself, it is supported by PAS as supporting creditor whereas two of the opposing creditors, namely, the chargees had filed their notice of discontinuance in the matter and the remaining two opposing creditors had not presented themselves at the hearing of the petition. It must be remembered that the judgment debt as at 1 October 1993 was RM4,997,623.61 which can be considered an astronomical figure even in today's high finance atmosphere and the proposal to pay RM30,000 monthly by the respondent cannot be said to be either genuine or bona fide as it had been made about three years after the petition had been served on them and only a week before the date the hearing of the petition was originally fixed. The respondent's profits for 1993, although a good sign considering their earlier losses, were only a modest RM97,557 which would cover only three monthly payments at the rate proposed by them. Any possibility of a better margin in their future profits is highly speculative in the circumstances. At the amount proposed by the respondent, payment would take at least 13 years. In addition, they also owe the Government and PAS another RM1.8m.

To my mind, the respondent have no assets to meet its current liabilities and are therefore commercially insolvent. It is more than obvious that they are unable to pay their debts especially considering the fact that the judgment against them was granted almost eight years ago. Although winding up is to be regarded as a remedy of last resort and one which ought not to be granted if some other less drastic form of relief is available and appropriate, I find none here. I had accordingly granted the petition as prayed.

Petition allowed.

Reported by Anne Khoo